Delco Electronics Corporation, a Division of General Motors *and* Gary Mannies. Case 25–CA–24251

April 14, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On November 21, 1997, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Delco Electronics Corporation, a Division of General Motors, Kokomo, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Within 14 days from the date of this Order, offer Gary Mannies full reinstatement to the shift and department he was on at the time of his transfer or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.''

2. Substitute the following for paragraph 2(d).

''(d) Within 14 days after service by the Region, post at its facility in Kokomo, Indiana, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 1995.''

Joanne C. Mages, Esq., for the General Counsel.
Mark Pieroni, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on September 8 and 9, 1997, based on a charge which was filed by Gary Mannies, an individual, on October 4, 1995, and a complaint which issued on July 15, 1996. The complaint alleges that Delco Electronics Corporation, a Division of General Motors (Delco or the Respondent) threatened an employee with transfer to another shift or other reprisals and transferred an employee to the second shift because he sought the assistance of his collective-bargaining representative, in violation of Section 8(a)(1) and (3) of the Act. Delco's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture, sale, and distribution of radios and related products at its facility in Kokomo, Indiana, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Indiana. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Amalgamated Local Union No. 292, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union or Local 292) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

From mid-1990 until May 1995, Gary Mannies was employed as a machine builder on the first shift in Respondent's department 1417. In that department, equipment used in the production of the Respondent's products is designed and fab-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find merit in the General Counsel's exceptions to the judge's inadvertent failure to require that the Respondent offer the Charging Party reinstatement to the shift *and department* in which he worked at the time of the transfer. We amend the remedy and shall modify the Order accordingly.

Consistent with *Excel Container, Inc.*, 325 NLRB No. 14 (Nov. 7, 1997), we have also revised the triggering date of the Respondent's notice-mailing obligation to the date of the first unfair labor practice.

ricated. Until his transfer to the second shift, which is the subject of this action, he was the least senior employee on the first shift. His immediate supervisor while on that shift was Rusty Miller; Miller's superior was Hal Smith, the operations manager who is alleged to have threatened and discriminatorily transferred Mannies.

The Respondent's machine builders, and certain other employees, have long been represented by Local 292, UAW. The Locals' representatives with whom Mannies primarily dealt were Franklin Witt, district committeeman, and George Anthony, zone committeeman. Collective-bargaining agreements, on the national and local levels, governed the relationship between the parties.

Among the relevant provisions of the local agreement is one, referred to as Document 59, which governs subcontracting from department 1417. In essence, it provides that there must be full utilization of the Respondent's employees before work may be subcontracted. Full utilization is defined as all employees working 56 hours per week. By practice, when the employees are to be fully utilized, they work five 10-hour days and one 8-hour day rather than seven 8-hour days so that they may enjoy Sundays off. In order to equalize what they would make on the 6-day schedule with what their earnings would be with Sunday premium pay (double time), they start work at 4:30 a.m. and work until 3 p.m. By starting at 4:30 a.m., they earn third-shift premium (10 percent) for the entire shift. If they were to start later than 4:30 a.m., they would only earn the third-shift premium until 7 a.m.

The contract also provides for shift preferences by seniority, allowing a more senior employee on one shift to bump a less senior employee from another shift.

And, the contract provides a grievance procedure. Among the issues subject to that procedure are allegations of retaliation for employee participation in union activities or recourse to the collective-bargaining agreement.

Department 1417 has long worked just two shifts, first and second. This permits around-the-clock operations (with overtime) when necessary, interaction between the skilled trades employees and engineers who may be working outside of normal shift hours and full utilization of the department's equipment. Generally, the majority of department 1417 workers, including about 22 machine builders, work on the first shift and 5 to 8 employees, including 4 to 6 machine builders, work on the second.

B. *Protected Activity and the Alleged Threat*

In late April 1995,[1] Mannies heard his supervisors, Miller and Smith, discussing placing department 1417 on full utilization. He learned from them that their intention was to start the employees' workdays at 5 a.m. in order that the Respondent not have to pay the third-shift premium for the full workday.[2] Mannies subsequently asked Miller to call in his union representative, District Committeeman Franklin Witt. Miller complied, placing a call to the department in which Witt worked.[3]

When Witt came to department 1417, Mannies told him what Miller and Smith intended for the employees' hours. Witt stated that there was nothing he could do and referred Mannies to George Anthony, the zone committeeman. Mannies repeated what he had said to Witt and Anthony assured Mannies that he would talk to Smith and straighten the matter out.

Anthony spoke with Smith that same day. Smith explained his understanding that, as long as the employees worked 56 hours prior to any outsourcing, management had met its responsibilities to them. Anthony told Smith that he would have to either start the employees at 4:30 a.m., so that they got the third-shift premium, or go back to the original agreement and work them 7 days so that they would get both the Saturday and Sunday overtime rates, time and one-half, and double time, respectively. Smith didn't like it; Anthony told him to think it over and discuss it with his superiors or with personnel in the Labor Relations Department. On the following day, Smith told Anthony that the department would work the 4:30 a.m. to 3 p.m. schedule and fulfill the full utilization requirement in 6 days.[4]

About May 1, as Mannies recounted it, Smith approached him at his tool cart and stated, ''You know, we . . . bent over backwards to keep you on first shift.'' Mannies asked what that had to do with the issue of the starting and stopping times and was told, ''I'm going to put your ass on second shift for calling the Union.'' Mannies accused Smith of threatening him for standing up for his rights and, as he was walking away from Mannies' cart, was heard by Mannies to say, ''I'm going to get you.'' There were no other witnesses to this alleged threat.

When Mannies told Miller of this conversation, Miller assured him that Smith ''was just mad about the third-shift premium and was just bulling off.''

Smith denied knowledge of Mannies' role in complaining to the Union and he denied making any such statements to Mannies. Miller denied telling Smith of Mannies' call to Witt and further denied both that Mannies had told him of Smith's alleged threat and that he had told Mannies that Smith was annoyed about the third-shift premium and was just ''bulling off.''

I credit Mannies' version of the events described above.[5]

---

[1] All dates hereinafter are 1995 unless otherwise indicated.

[2] Mannies' testimony on this point was credibly offered and is uncontradicted.

[3] A record of this call would have been made in Witt's department. Miller did not know if that record had been retained and it does not appear in this record.

[4] I find that Anthony's credibly offered testimony is more accurate than that of Smith. Smith initially claimed that he could not recall having discussed the hours with the Union. He then conceded that ''[t]hey may have found something on the outside that I wasn't aware of and forced us to do that, yes. That's possible.'' When subsequently cross-examined in Respondent's case-in-chief, he recalled the conversation with Anthony and defended his actions by claiming that, as the employees were already working more than 56 hours per week, (presumably including Sundays) he did not believe he was in violation of the agreement. He further acknowledged that he had made an agreement with the Union that, when employees were working under document 59, they would begin the first shift at 4:30 a.m. and that he changed the starting time as a result of this discussion with Anthony. He also admitted that, as he didn't ''like giving away the company's money, [he didn't feel] overjoyed about it.''

[5] In so finding, I have considered, in addition to their relative demeanors, that Smith would have known of Mannies' interest in the document 59 issue from his having discussed the hours question with Miller and Mannies several days earlier. I have also considered certain evidence discussed below. Thus, I note that, when Anthony asked Smith whether he had had any ''bad words'' with Mannies,

C. *The Transfer to Second Shift*

As earlier noted, department 1417 operates during the first and second shifts. On April 28, two second-shift employees, Douglas Anderson and William Perry, submitted applications for shift preference, seeking to move to the first shift. Both had greater seniority than Mannies. About May 4, Miller told Mannies that, as the least senior employee on the shift, he was being bumped to the second shift. The second least senior employee, Ron McColley, was also told that he was being bumped.

Mannies appealed to Miller, Smith, and Michael Hill in the Labor Relations Department, seeking to stay in the first shift on the basis of a personal hardship.[6] His request was denied, although, pursuant to company policy, he was allowed to remain on the first shift for 3 weeks to make necessary arrangements for the change in his schedule. Similarly, McColley was also allowed to remain on the day shift for 3 weeks. When Mannies asked Hill, after the expiration of the first 3-week stay, whether he could put in 1 day on the second shift and then be given a temporary transfer back to the first shift, and continue doing that every 3 weeks, he was told ''No.'' That, Hill told him, would be ''playing games, that they wouldn't do that for anybody and it shouldn't have been done in the past.''

On May 4, after being told of his impending transfer, Mannies spoke in succession with Will, Anthony, and Tony Long, then shop chairman. He purportedly told each of Smith's threat and each declined to pursue a grievance on his behalf.[7]

Anthony did, however, speak with Smith, in an attempt to avert the transfer. Smith insisted that Mannies was being transferred under the terms of the contract. When asked by Anthony whether he had had ''any bad words'' with Mannies, Smith replied he had told Mannies ''what my position was *on the start/stop time*,'' that Mannies had told Smith what his position was and they both knew how the other felt.[8] Anthony subsequently told Mannies that the Local would not pursue a grievance it could not win and, in this case, where there were no witnesses to the threat, and the transfer was consistent with the contract, a grievance was not winnable.

After a 3-week delay, Mannies was transferred to the second shift.[9]

McColley, however, never went to the second shift for more than a day or two at a time. Every 3 weeks, he would technically be assigned to the second shift. He would work there for a day, or possibly just take a day of leave, and then be allowed to return to the first shift for another ''temporary'' three week assignment. This ''game'' went on for about 14 weeks, until he was in a position to transfer back to the first shift on a permanent basis.

The Respondent explained that McColley was given the repeated temporary transfers because he was working on a successful project which was in the ''de-bugging'' stage, wherein he was needed to work closely in conjunction with the engineers. Mannies, on the other hand, was working on a project which was ''floundering,'' the balance of which could be, and was, assigned to someone else. There was, according to Smith, no comparable reason to keep Mannies on the first shift.

According to Smith, Mannies' transfer was ''simply an automatic thing,'' mandated by the collective-bargaining agreement and the needs of the business, the result of being lower in seniority than those who transferred on to the first shift. While there was no requirement that there be any specific number of employees on either shift, Smith claimed that he made it a rule to keep five to eight employees on the second shift. This, he said, made the department more efficient, cutting down on time lost while employees waited to use a machine in use by another employee and permitting employees to work with engineers who might be working outside the hours of a single shift. The record, however, does not show how many people there were on the second shift when Perry and Anderson exercised their shift preferences to come to the first shift.

The record contains only generalized evidence concerning the numbers of employees on each shift at any given time. It also contains only testimonial evidence, essentially anecdotal, concerning the practice respecting transfers between shifts. That testimony, however, is sufficient to establish that bumping was not the rule when employees moved between shifts in department 1417. Indeed, while Smith claimed that there may have been ''a few special instances'' when someone transferred without affecting a bump, bumping appears to have been more the exception.

Thus, when Mannies came in to department 1417 in 1990, he was told that assignment to the second shift was voluntary. Thereafter, while he was almost always the least senior machine builder on the first shift, he was never bumped to second shift until the transfer in question[10] notwithstanding that moves between shifts were not uncommon. In recent years (since 1993 or 1994), employees Tilley, Kelly, Gierke, and Kaiser have all moved back and forth between the first

---

Smith's reply made the connection between the alleged ''bad words'' and the document 59 issue. Nothing in Anthony's query had suggested that there had been any discussion between Mannies and Smith about that issue. I note, also, the disparate treatment accorded Mannies, which leads me to conclude that Smith made good on his threat. That Mannies did not tell everyone of the threat, or, if he did, not everyone recalled him doing so, does not convince me that the threat was not voiced. Neither am I persuaded of that by the Union's failure to grieve either the threat or the transfer. The Union's refusal to proceed on grievances it deems unwinnable is understandable.

[6] Mannies had a family situation requiring that he be there when one of his children came home from school. Suffice it to say that the situation was both real and serious.

[7] Witt only recalled being told that Mannies believed that Smith had put him on second shift for some reason; he did not recall being told of any threat. He did not preclude the possibility that he was told of the threat, noting the number of calls he received each day, and said that he would have recalled such a threat and reacted to it *if he had investigated it* and found it to be true. Long did not testify. Anrthony confirmed that Mannies had told him of Smith's anger at having raised the issue of the hours and having threatened him.

[8] Anthony's credibly offered testimony about this conversation is uncontradicted.

[9] After about a week, Mannies voluntarily transferred to another department, purportedly out of fear for continued retaliation by Smith. He remained on the second shift, thereafter, by choice due to a change in his child's school schedule.

[10] Anthony recalled one instance, 1 or 2 years before these events, when a bump of Mannies to the second shift had been proposed. He intervened with Smith at that time and the involuntary transfer was averted.

and second shifts; there was no evidence of anyone being bumped in either direction. When Perry and Anderson transferred to the second shift in late 1994, no one was bumped from that shift to the first shift. Since they had not filled any vacancies on the second shift when they went there, it seems logical to assume, in the absence of some contrary x. evidence, that they created no vacuum when they left it.

Subsequent to Mannies being bumped, when McColley returned to the first shift on a permanent basis, and when employees Sprang and Crawford also transferred to the first shift, no one was bumped. Since that time, service on the second shift has been deemed voluntary.

D. *Analysis and Conclusions*

No citation of authority is required to find that Mannies was engaged in protected activity when he brought the start time issue to the Union's attention. Neither are any required to find Smith's threats to ''put [Mannies'] ass on second shift'' and to ''get'' Mannies for having called in the Union, violative of Section 8(a)(1) as interference, coercion, and restraint of such protected activity.

Similarly, no lengthy discussion of the 8(a)(3) issue is required. Application of the *Wright Line*[11] mode of analysis mandates a finding of a violation. Thus, Mannies was engaged in protected activity. As I have found, the General Counsel has shown that Smith was both aware of that activity and angered by it. He voiced his animosity toward Mannies expressly for having sought out the assistance of the Union; that expression of animosity took the form of a threat to do exactly what he did do, transfer Mannies to the second shift. And, the General Counsel's evidence and the record as a whole reveals that there were no hard and fast requirements mandating that Mannies be bumped off of the first shift. Indeed, it shows that Mannies was treated differently this time from how he had been treated in the past and differently from other employees in that department under like circumstances. This evidence raises a strong inference (or prima facie case) that Mannies' transfer was discriminatorily motivated.

Under *Wright Line*, the burden then shifts to the Respondent to show that Mannies would have been transferred even if he had not engaged in any protected activity. The Respondent's evidence fails to rise to this level. It did not show that anyone had been bumped in department 1417 when an employee in the other shift (be it first or second) exercised a shift preference. It did not show that, with the transfer of Perry and Anderson to the first shift, there was an imbalance even under Smith's loose manpower standards. It did not show that retention of Mannies on the first shift would have impeded the use of any of the department's many machines.

Thus, I find that, on the record as a whole, the General Counsel has shown, by a preponderance of the evidence, that the Respondent both threatened and discriminated against Gary Mannies in violation of Section 8(a)(1) and (3).

CONCLUSIONS OF LAW

1. By threatening an employee with reprisals for having engaged in union and other protected activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discriminatorily transferring an employee to the second shift because that employee had engaged in union and other protected concerted activities, the Respondent violated Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily transferred an employee to another shift, it must offer him reinstatement to the shift he was on at the time of the transfer and make him whole for any loss of earnings, computed on a quarterly basis from date of transfer to the date of a proper offer of reinstatement, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Delco Electronics Corporation, a Division of General Motors, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals because they engage in union or other protected concerted activities.

(b) Transferring employees to other shifts or otherwise discriminating against them because of their union and other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gary Mannies full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gary Mannies whole for any loss of earnings suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Kokomo, Indiana, copies of the attached notice

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten reprisals against employees who engage in union or other protected concerted activities.

WE WILL NOT transfer you to other shifts or otherwise discriminate against any of you for engaging in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Gary Mannies full reinstatement to his former job on the first shift in department 1417 or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gary Mannies whole for any loss of earnings resulting from his discriminatory transfer, plus interest.

DELCO ELECTRONICS CORPORATION, A DIVISION OF GENERAL MOTORS